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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JAMES DORAN, Defendant and Appellant.	A122143 (Contra Costa County Super. Ct. No. 05-071836-1)

Daniel James Doran (defendant) appeals his conviction based upon a plea of no contest to one count of violating Penal Code section 311.11, subdivision (a). On appeal, defendant contends the court erred in denying his motion to quash the search warrant and suppress child pornography found in a search of his home computer because the facts recited in the affidavit did not establish probable cause to believe child pornography would be found on his computer.

We hold the information in the affidavit in support of the search warrant was not stale, and that it established probable cause to believe child pornography would be found in a search of defendant's residence and of his personal computer.

FACTS

Defendant was arrested when a search of his home pursuant to a search warrant resulted in the discovery of 92 images of child pornography on his personal computer. Defendant filed a motion to quash the search warrant and to suppress all evidence seized by the police department on the grounds the information set forth in the affidavit was

stale and did not provide probable cause to search his residence and his personal computer.

Detective Greg Leonard submitted the affidavit in support of the application for a warrant to search defendant's home, vehicles, computer systems, and related electronic equipment for child pornography violating Penal Code section 311.3 or 311.11. The affidavit stated that in September 2006 Leonard met with Special Agent Dana Unger of ICE/Homeland Security. Special Agent Unger informed Detective Leonard of the following facts learned in a federal investigation.

In October 2005, the United States Attorney for the District of New Jersey began an investigation of an illegal child pornography website, "illegal.cp." The investigators determined that persons who subscribe to the website had access to thousands of child pornography images and videos. "[W]hen a subject viewed the illegal.cp web-site, several images of what appeared to be minors engaging in sex acts with others were displayed. If the subject clicked on the 'Join Now' icon, the subject [would be] instructed to enter personal information, as well as credit card information." The subject would then receive an e-mail confirmation from theodore_dykstra@hotmail.com, containing a login name and password. A charge of $79.99 would appear on a credit card statement as a purchase from " 'AD SOFT.' " Thereafter whenever the subscriber logged into the website, he or she would see a warning that he or she was entering an illegal website containing child pornography.

Through an email wiretap of theodore_dykstra@hotmail.com the federal investigators obtained the names of many subscribers including defendant. The federal investigators found the email address defendant used, and his address in Tucson, Arizona. They also obtained defendant's credit card records by federal subpoena, and determined defendant had a charge of $79.99 on February 12, 2006, for a purchase from AD SOFT. The federal investigators also determined that on June 21, 2006, defendant closed his account with Tucson Water, and provided Tucson Water with a new mailing address in Walnut Creek, California.

After defendant moved to Walnut Creek, California, Special Agent Unger was assigned to investigate defendant. Unger determined defendant was a registered sex offender in the State of Arizona for a 2002 conviction for possession of child pornography. Defendant was in the Army at the time of this offense and was convicted in a military court.

Special Agent Unger informed Detective Leonard that the United States Attorney had declined to seek a search warrant for the Walnut Creek address based upon the foregoing information because he "felt it would be hard to prove [defendant] brought his computer" from Tucson, Arizona to Walnut Creek, California.

Detective Leonard did a computerized records check and confirmed defendant was listed as a sexual offender by the Pima County Sheriff's Department in Arizona. He also determined that defendant's current address was the Walnut Creek address he had provided to Tucson Water. Detective Leonard also found criminal records showing that, in February 2002, defendant pleaded guilty to sexual exploitation of a minor in military court. Defendant received a general court martial, was confined for two years, and was given a "bad conduct" discharge.

Detective Leonard also obtained a copy of a police report relating to the underlying charge. According to Detective Leonard the report stated that before defendant was turned over to the military authorities he "admitted to downloading child pornography for over one year."

Detective Leonard obtained a "Certified Conviction Packet" from the United States Army Judiciary Office of the Clerk of the Court. It disclosed defendant had been found guilty of violating title 18 of the United States Code section 2252A(a)(1) on multiple occasions between January 15, 2001, and March 12, 2001. Defendant appealed and the conviction and sentence were later set aside by the United States Court of Appeals for the Armed Forces.[1] During the appeal process, "it was documented that

[1] Neither the affidavit, nor any other document in the record explained the reasons for reversal of defendant's conviction.

[defendant] 'confessed to downloading and sending out multiple images of child pornography over a one-year period' and 'to receiving multiple images of adults engaged in sexual intercourse with children.' "

Detective Leonard also provided information concerning his education, training and experience with respect to sex crimes and specifically "sexual exploitation of minors." Based upon that expertise he averred that people who are sexually attracted to children and who buy, procure, trade, sell or possess child pornography "collect sexually explicit materials," and "rarely, if ever" dispose of it. He declared "people who collect and/or exchange child pornography frequently possess, or have access to, and use computer systems, to assist them in their activities; that computer users will commonly keep computer systems, computer hardware, software, and data in their homes." He also stated that computer users frequently "back up" copies of software to guard against loss in the event of computer malfunction and they keep those backup copies. He further stated computer users typically retain their computers, even though they move from location to location, "including out of state."

The magistrate found defendant's paid subscription to the illegal child pornography website was "an overwhelming piece of circumstantial evidence" that defendant was accessing the site, and downloaded material from it. The magistrate also found it was a reasonable inference that defendant would have brought his personal computer with him when he moved to California because it was common experience that people take their possessions with them when they move. The magistrate further observed that the fact that defendant purchased the subscription approximately 10 months earlier did not render the information too stale because "computer information on a hard drive is very different than staleness in any other context that might relate to warrants." He noted that even if the user attempts to delete information it usually can still be retrieved. The magistrate concluded the affidavit provided probable cause and denied defendant's motion to quash.

Defendant waived a preliminary hearing, and renewed the motion to quash the search warrant in the superior court. Neither party offered any new evidence. After the

superior court denied the motion, defendant entered a plea of no contest to violating section 311.11, subdivision (a). Pursuant to the terms of the plea, the court suspended imposition of sentence and placed defendant on formal probation on condition that he serve 120 days in county jail with credit for time served.

ANALYSIS

Defendant contends Detective Leonard's affidavit failed to state facts sufficient to support a finding of probable cause because the affidavit included no information that defendant had ever downloaded from a website containing child pornography. He further contends, even if it was reasonable to infer that he had downloaded such files, the information that defendant subscribed to a website containing illegal child pornography was approximately 10 months old, and is insufficient to support a finding of a fair probability that 10 months later, the files would still be found on the computer in his new residence in California.

"The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing. [Citations.] 'The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1040–1041.)

Where a motion to quash is renewed in the superior court, but no new evidence is introduced, this court directly reviews the magistrate's ruling and defers to the magistrate's determination on issues of credibility or weight of the evidence and resolution of conflicts in the evidence. (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1147; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223–1224.) This court, however, independently determines "whether, on the facts as found by the magistrate, the search

was reasonable under the Fourth Amendment." (*People v. Nicholls* (2008) 159 Cal.App.4th 703, 710; *People v. Hunter* (2005) 133 Cal.App.4th 371, 377.)

The facts set forth in Detective Leonard's affidavit are very similar to facts found sufficient to support a finding of probable cause in *United States v. Gourde* (9th Cir. 2006) 440 F.3d 1065 (*Gourde*).[2] In *Gourde,* the Ninth Circuit assessed the sufficiency of an affidavit in support of an application for a search warrant to search a computer for child pornography. The affidavit described an undercover investigation of an internet website, "Lolitagurls.com." An undercover agent joined the website by using a credit card to pay a monthly membership fee and ascertained that the site contained hundreds of images of child pornography. (*Id.* at p. 1067.) The FBI obtained a list of subscribers to the website. Gourde was listed as a member, and had subscribed for several months until the FBI shut down the site. (*Id.* at pp. 1067–1068.) The affidavit also explained how even a deleted file can be retrieved by computer forensic experts long after the file had been viewed or downloaded. (*Id*. at p. 1068.) Based upon the affiant's own expertise, and that of other experts, the affiant also described the habits of collectors of child pornography, and stated they " 'rarely, if ever, dispose of their sexually explicit materials.' " (*Ibid*.)

The court held the foregoing facts were sufficient to support the magistrate's conclusion "that there was a 'fair probability' that Gourde's computer contained evidence" that he violated a federal statute prohibiting among other things possession or knowing receipt of child pornography. (*Gourde, supra,* 440 F.3d 1065, 1069.) In addition to what the court described as the "certainty" that the website contained child pornography, the court reasoned that Gourde's status as a paying member "manifested his intention and desire to obtain illegal images." (*Id.* at p. 1070.) The court further held it was unnecessary for the affidavit to include subpoenaed records showing defendant had downloaded images from the website because "a probable cause determination may be

[2] The decisions of the lower federal courts on issues of federal law are not binding on this court but they are persuasive authority. (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

based in part on reasonable inferences." (*Id.* at p. 1071.) The court held, "It neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer." (*Ibid*.) Finally, in light of the "long-memory" of computers and the ability to recover deleted files, the court held the passage of approximately four months between the closing of the website, and the execution of the warrant did not render the information too stale to support a finding of a fair probability the images could still be found on Gourde's computer. (*Ibid*.)

Similarly, here, the information set forth in the affidavit pertaining to the federal investigation of the illegal.cp website provided ample factual basis to conclude illegal child pornography was available for viewing and downloading on the website, and that defendant had paid to become a subscriber. Defendant urges that we adopt the views expressed by the dissenting opinion, in *Gourde* that an affidavit in support of a warrant to search a personal computer should not rely upon inference and must instead include direct evidence of actual downloading of images. (*Gourde, supra,* 440 F.3d 1065, 1079 (dis. opn. of Kleinfeld, J.).) We, however, are persuaded by the reasoning of the majority in *Gourde* that it is not necessary under the "fair probability" standard to include direct evidence that defendant had actually downloaded images. (*Id.* at pp. 1072–1073.) The act of paying to subscribe to the website distinguishes defendant from an accidental browser, or a person who casually viewed the site. By paying for access and obtaining a password and login name defendant clearly manifested that he intended to have, and wanted to continue to have, access to the illegal images available on the website. The magistrate therefore reasonably inferred that, as a person with sufficient interest in images of child pornography to pay for access to the website, defendant had probably downloaded such images onto his computer. (*Id.* at p. 1071.)

Moreover, here, the strength of the inference that defendant had probably downloaded images was reinforced by defendant's admissions that he had downloaded such images in the past. According to the affidavit, these admissions were recorded in a

police report stating that when he was arrested for the offense underlying the 2002 conviction, defendant admitted he had been downloading child pornography for over a year. The conviction was subsequently overturned, but the affidavit also included information from the certified conviction packet that defendant had " 'confessed to downloading and sending out multiple images of child pornography over a one-year period' and 'to receiving multiple images of adults engaged in sexual intercourse with children.' " Defendant argues that the admissions were hearsay, and unreliable. It is however well established that affidavits may rely upon hearsay in support of a search warrant, and the police report, and certified court records are sufficiently reliable sources. (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 575; *Mueller v. Department of Motor Vehicles* (1985) 163 Cal.App.3d 681, 685.) These admissions together with defendant's more recent paid subscription to illegal.cp supported a reasonable inference that defendant intended to, and probably did, download child pornography after he subscribed to illegal.cp.

Defendant next argues that *Gourde* is distinguishable because in *Gourde* only four months elapsed between the purchase of a subscription and the execution of a warrant whereas, here, defendant subscribed to the website on February 12, 2006, approximately 10 months before Detective Leonard applied for the search warrant. Defendant contends that this 10-month lapse rendered the information too stale to support a fair probability that downloaded images would still be on his computer because there was no factual basis in the affidavit that he actually downloaded any images from the website, or is a collector of child pornography. Defendant also asserts the fact that he moved during this 10-month period made it even less likely illegal child pornography would be found in a search of his computer. In support of the latter contention he relies upon the affidavit itself, which acknowledges the United States Attorney declined to seek a warrant because he thought it would be too difficult to prove defendant brought the computer with him when he moved.

There is no bright line after which information is deemed too stale to support a finding of probable cause. Instead, staleness is assessed "in light of the particular facts of

the case and the nature of the criminal activity and property sought." (*United States v. Greany* (9th Cir. 1991) 929 F.2d 523, 525.) The information offered in support of the application for a search warrant is not stale if "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." (*United States v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.)

In *United States v. Lacy* (9th Cir. 1997) 119 F.3d 742, the court held a lapse of 10 months between the time the affidavit stated the defendant had downloaded child pornography images from a website and the application for a warrant to search his house and computer did not render the information too stale. In *Lacy*, as in this case, the affiant "explained that collectors and distributors of child pornography value their sexually explicit materials highly, 'rarely if ever' dispose of such material, and store it 'for long periods' in a secure place, typically in their homes." (*Id.* at p. 746.) The court held that although it would not "assume that collectors of child pornography keep their materials indefinitely, . . . the nature of the crime, as set forth in this affidavit, provided 'good reason[]' to believe the computerized visual depictions downloaded by Lacy would be present in his apartment when the search was conducted ten months later." (*Ibid.*)

For similar reasons, we conclude the 10-month lapse in this case between the purchase of access to illegal.cp and the application for a search warrant did not render the information contained in the affidavit stale. Although unlike *Lacy, supra*, there was no direct evidence that defendant actually downloaded from the website, we have already held it was reasonable to infer that defendant had probably downloaded child pornography from the website for which he had a paid subscription. The fact that he purchased a subscription after admitting five to six years earlier to downloading child pornography also supports an inference that his interest was not limited merely to viewing images online. Moreover, the admission to downloading child pornography in the past coupled with the more recent purchase of access to illegal.cp also provided the magistrate with a factual basis for concluding defendant's interest in accessing child pornography was a continuing pattern, not an isolated act. These facts also linked defendant to the expert description in the affidavit of a collector of child pornography

who is not likely to destroy files he had downloaded. (Cf. *United States v. Weber* (9th Cir. 1991) 923 F.2d 1338 [affidavit insufficient to establish probable cause because it merely provided boilerplate descriptions of persons who collected child pornography based upon an isolated act without providing facts to link defendant to that profile].)

It was also reasonable for the magistrate to infer that it was likely defendant still had the computer 10 months after purchasing access to illegal.cp. Defendant's reliance upon the United States Attorney's opinion that it would be too difficult to prove defendant took the computer with him when he moved, is misplaced because we are reviewing *the magistrate's* probable cause determination, not the United States Attorney's stated reasons for not seeking a search warrant. The magistrate found that it was likely defendant would have taken his computer with him based upon common experience that people generally take important possessions with them with they move. This common sense observation, coupled with the information we have already examined that linked defendant to the expert description of a collector, supports an inference that defendant was probably not a person who would lightly discard computer files containing child pornography. We reject defendant's assertion that the absence of evidence such as records of an active email account, or bills for an internet cable connection precludes an inference that defendant brought the computer with him when he moved. No doubt such evidence would have strengthened the inference that defendant had brought his computer with him, but the standard for probable cause, is a "fair probability" not "near certainty," and therefore does not *require* that information meeting a standard of near certainty be included in the affidavit. (*Gourde, supra*, 440 F.3d 1065, 1072.)

For all of the foregoing reasons, we conclude, based upon the totality of the circumstances, the affidavit provided the magistrate with a sufficient factual basis to conclude there was a fair probability that evidence of downloaded files containing child

pornography would be found in a search of defendant's computer 10 months after he purchased access to the website. (*People v. Kraft, supra*, 23 Cal.4th 978, 1040–1041.)[3]

CONCLUSION

The judgment is affirmed.

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Graham, J.*

We concur:

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Marchiano, P. J.

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Margulies, J.

[3] In light of this conclusion we need not reach the Attorney General's alternative argument that, even if the affidavit failed to establish probable cause the evidence found in the search would nonetheless have been admissible under the good faith exception to the exclusionary rule, established by *United States v. Leon* (1984) 468 U.S. 897, 922–923.

* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.